APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 310—October Term, 1962

(Argued April 29, 1963 Decided June 24, 1963)

Docket No. 27970

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY, and THE THIRD NATIONAL BANK AND TRUST COMPANY,

Plaintiffs-Appellees,

v.

CITIZENS UTILITIES COMPANY,

Defendant-Appellant.

Before:

CLARK, SMITH and HAYS, *Circuit Judges.*

MILTON S. GOULD, New York, N. Y. (Gallop, Climenko & Gould, New York, N. Y. and Clifton G. Parker, Morrisville, Vermont, on the brief) *for defendant-appellant.*

ARTHUR L. GRAVES, St. Johnsbury, Vermont, *for appellees John A. Prouty and Elsinor Prouty Mallory.*

EDWIN W. LAWRENCE, Rutland, Vermont, *for appellees Charles T. Prouty, Genevieve Prouty Gage, and The Third National Bank and Trust Co.*

KENNETH P. AKEY, Burlington, Vermont, *for appellee Elsinor Prouty Mallory.*

SMITH, *Circuit Judge*:

The four plaintiffs are the heirs of Abbie D. Prouty who executed a lease of certain property to the Newport Electric Light Company, predecessor of the present defendant, in 1930. The leasehold was land on both sides of the Clyde River, a stream in northern Vermont. Most of the fall of that river, from its source to mouth, is concentrated on plaintiffs' property. At present, the Citizens Utility Company has erected and is maintaining penstocks (a type of conduit) bringing water from a dam upstream to generating facilities below. There is apparently no alternate route for the penstocks and they are a necessary part of defendant's hydroelectric development. The lease was for a twenty-five year term and provided a monthly rental and an option to purchase before October 1, 1935 for $150,000. In the event that the option was not exercised, as it was not, the lessee was required by the terms of the lease to purchase the property within six

months after its expiration either at a mutually agreed price, or for $300,000, or by instituting proceedings to acquire the property through condemnation "before the tribunal then having jurisdiction of such proceedings."

Apparently believing that the Vermont Public Service Commission was the proper body, defendant instituted condemnation proceedings before it to acquire the property on March 27, 1956. Plaintiffs countered by bringing this action on May 11, 1956—the six-month period had meanwhile expired on March 30, 1956. Plaintiffs claimed that the sole body having "jurisdiction" was the Federal Power Commission, arguing that the Clyde was a navigable stream under exclusive federal regulation. As Citizen Utility had never sought the federal license required by law (16 U. S. C. § 817) for its operations, the federal statutory provisions permitting a licensee to institute condemnation proceedings before an appropriate state tribunal (16 U. S. C. § 814) and the implementing Vermont legislation (30 Vt. Stats. Ann. §§ 109-115) were said to be inapplicable. The complaint asked injunction of further proceedings before the Vermont Public Service Commission and specific performance of the contract at the stated price of $300,000, now the only available alternative. Jurisdiction was based on diversity of citizenship: Citizen Utilities was a Delaware corporation and plaintiffs were citizens of other states.

The District Court held that the Clyde River was indeed navigable (pursuant to the verdict of an advisory jury), and that federal legislation had superseded state jurisdiction over navigable waters. The Court refused to grant the injunction, but concluded the defendant should have applied to the Federal Power Commission for a license to acquire the property in order to place its controversy before a tribunal having jurisdiction, and that the plaintiffs were therefore entitled to specific performance

of the agreement at the $300,000 sale price. *Prouty* v. *Citizens Utility Co.*, 150 F. Supp. 892 (D. Vt. 1957). On appeal, this Court reversed, holding that the grant of specific performance was effective interference with the prior state proceeding before the Vermont Public Service Commission, tantamount to the injunction of state proceedings forbidden by 28 U. S. C. § 2283. The final judgment, however, was that the complaint not be dismissed but instead held pending, so that in the event that the state determined that it had no jurisdiction the plaintiffs would be free to prosecute further federal proceedings to enforce their rights. 257 F. 2d 692 (2 Cir.), cert. denied 358 U. S. 867 (1958).

On February 16, 1959, the Federal Power Commission ruled that the Clyde River was navigable and directed the defendant to apply for a license for its future operations. 27 P. U. R. 3d 183 (1959). No mention was made of the condemnation proceedings then still pending before the Vermont Public Service Commission. On review in this Court, the order was affirmed on the ground that the last mile of the Clyde was navigable, and as defendant's activities along the upper reaches of the river affected the navigable portion, they were also within the regulatory jurisdiction of the Federal Power Commission. *Citizens Utilities Co.* v. *Federal Power Comm'n*, 279 F. 2d 1 (2 Cir.), cert. denied 364 U. S. 893 (1960). This, however, did not prevent the Vermont Public Service Commission from ruling later in 1960 that it had jurisdiction over the condemnation proceedings (pending since 1956) and awarding $95,000 compensation for the property. (It should be noted that expert valuations of the property ranged from $2,000 to about $215,000. Only the plaintiffs themselves testified that it was worth $300,000.) But the order granting compensation was reversed "for want of jurisdic-

tion" by the Supreme Court of Vermont. *Citizens Utilities Co.* v. *Prouty*, 122 Vt. 443, 176 A. 2d 751 (1961), cert. denied 369 U. S. 833 (1962).

The litigants returned to the District Court for the District of Vermont where it was again held on the 1956 complaint that the plaintiffs are entitled to specific performance of the contract at the set price of $300,000. The Court based its conclusion on the holding of the Supreme Court of Vermont, stating that the finding of present lack of jurisdiction necessarily implied lack of jurisdiction at the outset, and that therefore the defendant never properly complied with the condemnation alternative in the lease. See 209 F. Supp. 26 (D. Vt. 1962). Though our rationale differs somewhat from this, we agree with the result and affirm the judgment.

As a matter of law, it is not necessarily true that a present lack of jurisdiction requires a finding that jurisdiction has always been absent. There have been examples of ouster of originally valid jurisdiction through supervening changes in facts or law. See, e.g., *Ex Parte McCardle*, 7 Wall. (74 U. S.) 506 (1869). Apparently realizing this, the parties have directed their entire arguments to the interpretation of the language of the Supreme Court of Vermont, attempting to convince us either that that Court did or did not decide that proper initial jurisdiction in the Vermont Public Service Commission had been "ousted" by the later action of the Federal Power Commission. Their difficulties stem not from a lack of clarity in that decision but from the fact that the Supreme Court of Vermont did not have the issue of initial jurisdiction before it and so, quite properly, did not decide it. All that the Supreme Court of Vermont was called upon to decide was whether, once the Federal Power Commission had required Citizens Utilities to secure a license, the Vermont Public

Service Commission could still act to condemn property on behalf of Citizens Utilities. The original state of affairs in 1956 therefore remains to be determined by this Court.

As this is a diversity action, we look first to Vermont law to decide the question whether the Vermont Public Service Commission had jurisdiction in 1956 of the condemnation proceedings instituted by Citizens Utilities. We find controlling authority in *In re Bellows Falls Hydro-Electric Corp.*, 114 Vt. 443, 47 A. 2d 409 (1946). In this action, the Supreme Court of Vermont dismissed on its own motion for lack of jurisdiction an appeal from an order of the Vermont Public Service Commission which had purported to regulate hydroelectric development on a navigable stream. The Court held that federal legislation had pre-empted the field and that the Commission had no jurisdiction to act, quoting extensively from *First Iowa Hydro-Electric Co-op.* v. *Federal Power Commission*, 328 U. S. 152 (1946). The case was cited with approval in *Citizens Utilities Co.* v. *Prouty*, *supra*, and we have no reason to suppose that it is not still the law of Vermont. It thus seems clear that Vermont would hold that without a license from the Federal Power Commission to the applicant, the Public Service Commission had no jurisdiction to condemn land in connection with a project involving navigable waters, even in the absence of any federal action. In light of this holding, we need not consider the problem of conflict with federal law that would be presented by a contrary resolution of the jurisdictional question. See *First Iowa Hydro-Electric Corp.* v. *Federal Power Commission*, *supra*.

Giving the terms of the contract their plain meaning, we find this determination dispositive of the case. To take advantage of the condemnation alternative, defendant was required to bring proceedings before a tribunal that would have power to hand down a "final" adjudication of the

value of the property and to decree its sale. This is the meaning of "jurisdiction" as the parties used it. Defendant did not do this. The evident purpose of the six months limitation and the three stated alternatives was to ensure that the plaintiffs could have a speedy sale at the termination of the lease. Defendant's actions thwarted this purpose. The plaintiffs were easily enough able to ascertain that the Vermont Public Service Commission was not the proper body before which to bring the condemnation proceedings, as witnessed by their institution of this action on what has proven to be the correct theory of the law only six weeks later. The decision of the Supreme Court of Vermont in *In re Bellows Falls Hydro-Electric Corp., supra*, had been on the books for some years. Vermont law refers to the necessity for a federal license or a state certificate—neither of which defendant had. 30 Vt. Stats. Ann. §§ 111(b), 115. Citizens Utilities apparently thought that it was worth the risk of having to pay $300,000 for the property to attempt to avoid having to secure the license required of it by federal law, with the attendant federal regulation. It is hardly reasonable to suppose that Citizens Utilities is surprised by the outcome of this litigation and that it did not realize in 1956 that it could have avoided the possibility of a sale at $300,000 at least by instituting parallel proceedings with the Federal Power Commission. The mistaken gamble is tantamount to a deliberate rejection of the condemnation alternative. The agreed terms of the contract gave the burden of making the choice of alternatives to the defendants. Plaintiffs are entitled to the benefits of this choice, for whatever reason it was made.

Defendant also assigns as error the amendment of the judgment to permit tender of separate deeds by the four plaintiffs and separate payment to them, as well as crediting defendant with amounts paid to plaintiff Elsinor Prouty

Mallory, "under an alleged contract." The purpose of the amendment was to permit the sale to be completed as far as possible despite a settlement agreement apparently made between defendant and Elsinor Prouty Mallory which the latter is now seeking to avoid through litigation presently pending. Defendant is concerned that this amendment will somehow adjudicate the invalidity of its settlement agreement and earnestly importuned us to set the amendment aside. We do not see how this is so; nor do we understand Judge Gibson to have intended any such result. The agreement and negotiations leading to it were not before him and they are not part of the record on appeal. More to allay the fears of the defendant than to correct error we order that the amended judgment be modified by adding the following sentence at the end: This judgment does not affect the validity or invalidity of any settlement made between defendant and plaintiff Elsinor Prouty Mallory.

So modified, the judgment is affirmed.

HAYS, *Circuit Judge*, dissenting:

In the sense in which the words of the contract should be read the Vermont Public Service Commission had jurisdiction over the condemnation proceeding brought by the defendant Company. The Commission was the appropriate body before which to bring such a proceeding, and it had the power to condemn the property. This is surely all that the parties could have meant by their agreement.

By reading the contract with even greater strictness than one would expect to find employed in the construction of the most technical of statutes the majority holds that, since the Vermont Commission could not proceed until the Company secured a license from the Federal Power Commission, the Vermont Commission did not have juris-

diction. For all that appears the Company in entire good faith believed that it was not required to have such a license. By the present decision its mistake as to the necessity of having a license is made the excuse for giving plaintiffs a windfall in the form of receiving $300,000 for property which was found in the abortive condemnation proceedings to be worth $96,000.

I must respectfully dissent.

APPENDIX B

TEXTS OF PERTINENT DECISIONS AND STATUTE NOT PRINTED IN THE RECORD BEFORE THE CIRCUIT COURT

DECISION OF DISTRICT COURT OF VERMONT

UNITED STATES DISTRICT COURT

D. VERMONT

April 9, 1957
Civ. A. No. 2015

CHARLES T. PROUTY, *et al.*,

—v.—

CITIZENS UTILITIES COMPANY.

ARTHUR L. GRAVES, St. Johnsbury, Vt., HAROLD I. O'BRIEN, Rutland, Vt., *for plaintiffs.*

CLIFTON G. PARKER, Morrisville, Vt., *for defendant.*

GIBSON, *District Judge*:

Plaintiffs seek specific performance by the defendant of a contract under the terms of which plaintiffs claim they are entitled to receive $300,000 from defendant, and in turn they are ready, willing, and able to deed certain real estate located along the Clyde River—in Orleans County, Vermont—to the defendant. Plaintiffs also seek an injunction restraining the Public Service Commission of Vermont from asserting jurisdiction of a petition for condemnation of this same real estate brought by the defendant before the Public Service Commission.

The defendant, in its answer, filed four affirmative defenses: First, that this Court lacks jurisdiction; second, that the Federal Power Commission is the only agency or tribunal that has jurisdiction; third, that the Vermont Public Service Commission has jurisdiction to hear defendant's condemnation petition now pending before it; and fourth, that the plaintiffs' complaint failed to state a cause of action.

The defendant also filed a motion to dismiss and a motion for judgment before trial, each based substantially on the affirmative defenses set forth in its answer.

This Court overruled the first, second, and fourth affirmative defenses, reserving decision on the third affirmative defense.

Trial was had in Rutland on November 13, 14, and 15, 1956. An advisory jury rendered a verdict declaring the Clyde River to have been a navigable stream at the time the defendant filed its petition for condemnation before the Vermont Public Service Commission.

Findings of Fact

1. The four individual plaintiffs, Charles Prouty, Genevieve Gage, John Prouty, and Elsinor Mallory, are citizens of Connecticut, Vermont, Vermont, and Florida, respectively. Plaintiff, the Third National Bank & Trust Co., is a Massachusetts corporation. Defendant is a utility company organized under the law of Delaware. The amount in controversy exceeds $3,000.

2. The plaintiffs are the present owners and successors in title to the lands and interests previously owned by Abbie D. Prouty, deceased, and are her only heirs.

3. Defendant is a utility company supplying electric power and energy to consumers in northern Vermont and

Canada, as well as in three other states. It is the successor in ownership of the Newport Electric Light Co.

4. On July 29, 1930, the Newport Electric Light Co. and Abbie D. Prouty executed under seal a written contract providing, in substance, for a lease for a term of 25 years from the 1st of October, 1930, of land and interest in Newport, Vermont, described in the contract as follows:

"Being all and the same land and premises which were conveyed by Spaulding Brothers Corporation, a corporation, to Charles A. Prouty by warranty deed dated December 31, 1906, and recorded in Book 27, Pages 595 and 596 of the Land Records of the Town of Derby, Vermont, more particularly described as the 'Spaulding Pulp Mill Property' so-called, situated on Clyde River in the City of Newport, Orleans County and State of Vermont, a little above the plant of the Newport Electric Light Company, with all waterpower and water privileges thereunto belonging or appertaining. Being the same land and premises conveyed to said Spaulding Brothers Company, a corporation, organized and existing under the laws of the State of Vermont by three several deeds:—

"(1) By a quit-claim deed from Edward F. Spaulding to said Corporation, dated August 26, 1901, and recorded in Book 25, page 80 of the Land Records of said town of Derby.

"(2) By a quit-claim deed from Waldo Spaulding to said corporation, dated August 26, 1901, recorded in Book 25, page 81 of the Land Records of the said Town of Derby.

"(3) And by Huntley N. Spaulding, as administrator of the estate of Jonas Spaulding, by an adminis-

trator's deed dated August 26, 1901, and recorded in Book 20, page 300 of the said Land Records, to which deeds and said records thereof, reference is hereby made for a more particular description.

"Meaning to include what is known as the Pulp Mill Property, water power, dam, water privileges, and all buildings, machinery and fixtures now on said property, and being the same real estate which was conveyed to the Newport Electric Light Company by Charles A. Prouty by an instrument dated June 29, 1907, and recorded in the Derby Land Records in Book 28, Pages 367 and 368; all of said property having been willed to Abbie D. Prouty by the late Charles A. Prouty, and having been decreed to said Abbie D. Prouty by the Probate Court, for the District of Orleans, State of Vermont."

5. The above-described lands constitute an irregularly shaped piece of land that lies astride the Clyde River. The Clyde River runs in a northerly direction for about 700 feet through approximately the center of this piece of land.

Prior to 1930, the date of the lease, there had been a dam across the Clyde River, known as the Pulp Mill Dam. This dam lay about 225 feet from where the Clyde River enters this property on its southerly boundary. The dam had been abandoned, however, and there were only remnants of it there at the time of the lease.

Along the Clyde River, about 200 feet northerly or northeasterly of this abandoned dam, had been an old pulp mill and shed, and at one time water from the Pulp Mill Dam was conveyed down to the old pulp mill by a penstock. That penstock was still there and being used on the date of the lease. Indeed on the date of the lease there was a penstock running the entire length of the land in question along

the east bank of the Clyde River, and in the vicinity of the old pulp mill it ran squarely in the bed of the Clyde River.

The predecessor in title of the defendant had constructed the penstock from where it entered the southerly edge of this property to the old penstock at the Pulp Mill Dam and there connected with the old penstock. It also erected the penstock which ran from the northerly terminus of what I will term the "Pulp Mill Dam penstock", in the vicinity of the old pulp mill, some 325 feet until it left the above-described premises at their northern border. This penstock continued on in a northerly direction to the power station of the defendant, located near the mouth of the Clyde River. Thus there was a penstock running across this entire property, most of it adjacent to the Clyde River on its east bank, totalling approximately 725 feet in distance in existence and in use at the date of the lease.

In 1931 or 1932, the defendant's predecessor in title constructed a second penstock from Clyde Pond to its power station near the mouth of the Clyde River. This second penstock lies easterly of the first penstock and crosses these lands for about 50 feet at the southeasterly corner of these premises and again for another approximately 175 feet running along the southeasterly border of these premises.

Both penstocks were being used by the defendant for the transportation of water when the lease hereinbefore referred to expired on the 1st day of October, 1955, and the defendant is continuing to use these penstocks at the present time. Both penstocks carry water diverted from the Clyde River.

6. This lease provided that the Newport Electric Light Co., its successors and assigns would pay Abbie Prouty, her heirs, administrators, executors and assigns, monthly rental at $65 and pay one-half of all taxes and assessments levied against this property during the term of the lease.

7. The lease also contained the following provisions:

"The Lessee may acquire title to the property described herein at any time prior to October 1, 1935 by paying the Lessor therefor the sum of $150,000.00 and any rentals then due and owing in accordance with the terms hereof. If the Lessee elects to so purchase said property within said period of time and tenders the purchase price above described to the Lessor, the Lessor shall execute and deliver to the Lessee coincident with said tender of payment, a warranty deed conveying to the Lessee fee simple title to the property described herein, free and clear from all charges and or encumbrances against the same, and thereupon this agreement shall terminate, and both parties be released from further liability hereunder.

"Should the Lessee not elect to acquire title to the property described herein prior to October 1, 1935, then the Lessee agrees that within six months after October 1, 1935 it will purchase, and the Lessor agrees that within said six months period, she will sell and convey the premises herein described to the Lessee and by good and sufficient warranty deed convey said premises to said Lessee in fee simple, free and clear of all charges and encumbrances against the same at a price satisfactory to both parties hereto, or if they cannot agree upon such a price, then at a price to be determined in the following manner:

"(a) The Lessee shall within said six months period institute proceedings to acquire the property above described by condemnation, such proceedings to be instituted before the tribunal then having jurisdiction of such proceedings. The value fixed in said proceedings for the property herein described shall be the price which the Lessee shall pay, and the Lessor accepts for the deed above described to said property.

"(b) If no price is agreed upon by the parties within said six months period, or if the Lessee has not instituted condemnation proceedings within said period as provided in the preceding paragraph, then the price which the Lessor shall pay to the Lessee for said deed to said property shall be the sum of $300,000.00.

"The Lessee agrees that if it elects to proceed by condemnation proceedings as herein provided, it will prosecute said proceedings with all reasonable diligence to a termination thereof.

"For the period that may elapse between October 1, 1955 and the date when the Lessee acquires title to the property from the Lessor as herein provided, the Lessee shall pay the Lessor on the last day of each month during said period, as and for rental for the use of said property during said period, the sum of $625.00, and in addition shall pay one-half of any taxes or assessments levied against said property during said period."

8. The Lessee did not choose to acquire title to this real estate, water power, dam, water privileges, and all buildings, machinery and fixtures then on this property prior to October 1, 1955, as provided for in the contract. Nor have the plaintiffs and defendant, since October 1, 1955, reached an agreement as to a satisfactory purchase price.

9. The defendant has not paid, or offered to pay, to the plaintiffs the sum of $300,000. The plaintiffs have at all times been willing, ready and able to tender to the defendant a satisfactory deed of this land, water power, dam, water privileges, and all buildings, machinery and fixtures on the property as of the date of the lease.

10. On March 27, 1956, the defendant filed a petition with the Vermont Public Service Commission seeking to

condemn the property and interests therein as described by the lease. This petition is still pending.

11. The jury found that the Clyde River was, in fact, a navigable stream within the meaning of the Federal Power Act. This verdict of the jury I approve.

12. Clyde River's source is in Island Pond in Brighton, Essex County, Vermont. It flows northwesterly through Charleston, Salem, Derby, and Newport into Lake Memphramagog. Generally speaking, it is a sluggish stream until it reaches to within a few miles of Lake Memphramagog. On its course it passes through Pensioners Pond and Salem Pond. It has a few short rapids. It is a principal tributary of Lake Memphramagog—itself a navigable body of water.

13. In the 18th Century it served as a highway for the Indians. From the St. Lawrence River the Indians would come up to the St. Francis and Magog Rivers in canoes, cross Lake Memphramagog, ascend the Clyde to Island Pond, and then make a short portage to the headwaters of the Nulhegan River—down the Nulhegan to the Connecticut River and down the Connecticut. Likewise, another Indian trail followed the same route from the St. Lawrence to the Connecticut; thence to the upper Ammonoosuc—up that river to some point in what is now Milan, New Hampshire; thence across to the Androscoggin River—and down it to the Atlantic Sea Coast and Penobscot Bay.

14. The Department of War sent a report to the House of Representatives of the Congress in April, 1826, which reported on the feasibility of a waterway from Lake Memphramagog to the Connecticut River by this route, and reported, in substance, that it was a practicable project.

15. During the 19th and early 20th Centuries the Clyde River was used as a highway for commerce. Logs were floated from its upper reaches to saw mills in Derby. Logs were converted into lumber, transported to Newport and freighted by rail to Boston. Pulp was floated from the upper reaches of the Clyde River to Lake Memphramagog.

16. The defendant Citizens Utilities Company has not applied for or obtained a license from the Federal Power Commission, pursuant to the Federal Power Act, 16 U.S.C.A. § 791a et seq., for the purpose of constructing, operating and maintaining its said dam, water conduits, reservoirs, power houses, transmission lines and other works for the development, transmission and utilization of electrical power and energy, across, along, from, over, and in the Clyde River.

17. The defendant Citizens Utilities Company, notwithstanding the construction and operation of its said dam, water conduits, reservoirs, power houses, transmission lines and other works across, along, from, over, and in the Clyde River, has never filed a declaration of its intention with the Federal Power Commission to construct, improve, operate or maintain its said dam, water conduit, reservoir, power house, transmission lines and other works, or any of said structures, across, along, from, over, and in the Clyde River, pursuant to Section 23 of the Federal Power Act, 16 U.S.C.A. § 817.

18. The interest of the plaintiff, the Third National Bank and Trust Company, is nominal only, being that of a naked trustee for the benefit of Charles T. Prouty, and that it joins as a party plaintiff only, that all proper parties may be before the Court.

Conclusions of Law

[1] Here we have a contract action between citizens of different states, and the matter in controversy exceeds the value of $3,000, exclusive of interest and costs. Under § 1332(a) (1) of the U.S. Code, Title 28, this Court has original jurisdiction of this action. The defendant's first affirmative defense of lack of jurisdiction is entirely without substance.

[2] Nor is there any merit in the fourth affirmative defense, i.e. that the complaint fails to state a cause of action. The complaint clearly alleges the existence of a written contract, a breach thereof, and a failure on the part of the defendant to comply with its terms. It asks for specific performance of the contract by the defendant.

[3, 4] Likewise, the defendant's second affirmative defense is unsound. It is to the effect that in any suit wherein violations of the Federal Power Act are involved, and compliance with the Act is sought, the proceedings must be brought exclusively by the Federal Power Commission. As a statement of the law, this proposition is valid. However, it is not applicable to this case. This action is a suit on a contract, for specific performance of a land purchase agreement; it is not a proceeding to compel compliance with the Federal Power Act. This suit does, as an incidental question, involve the interpretation of the Federal Power Act. This Court has jurisdiction to adjudicate such questions. There is nothing in the Federal Power Act, or any of the many Federal cases decided under it, which denies the U. S. Courts of jurisdiction to entertain suits which may incidentally involve interpretation of the Federal Power Act. Were such the case, and were we to hold as the defendant urges, the rendering of a final decision in a dispute such as this would be slowed down to a snail's pace. Prompt judicial determination of issues such as this would be ren-

dered impossible. The whole cause of justice would be harmed. In United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243, the United States brought a bill for an injunction against the Power Co., alleging that the New River was navigable. The District Court, 23 F.Supp. 83, heard the case and ruled the New River was non-navigable; the Court of Appeals agreed, 107 F.2d 769; but the Supreme Court held otherwise. No question was raised there that only the Federal Power Commission could determine the fact of navigability or non-navigability; nor could it have been successfully raised. The Federal Power Act grants no such exclusive right to the Federal Power Commission.

Thus we come to the third affirmative defense—and, as I see it, to the crux of this case. The defendant claims that the Vermont Public Service Commission does have jurisdiction to entertain the petition the defendant filed with that Commission on March 27, 1956. The prayer of that petition asks that "an order be made by the Commission entitling the petitioner to condemn said property and interests therein as above described." The "above described" refers to the description in the lease.

What is it that the defendant seeks to have the Vermont Public Service Commission condemn—it is what "is known as the Pulp Mill property, dam, water privileges, and all buildings, machinery and fixtures now on said property". It thus seeks to condemn the penstocks or water conduits being maintained and operated on this propert. These water conduits are fixtures. It seeks to condemn water privileges—it must be the privilege of flowing waters diverted from a navigable stream through these conduits and ultimately to its power dam that it seeks to condemn. It seeks to do this without having sought or obtained a license to do so from the Federal Power Commission.

When Vermont joined the Union in 1791, it subscribed to the Constitution of the United States. The Commerce Clause of this Constitution grants to the United States full and exclusive power over those waters which are capable of use as interstate highways. At that time, Vermont, then, would have jurisdiction of the riparian banks and bed of a navigable stream, and the United States jurisdiction over the water flowing in the stream.

After several different attempts by the Congress, through Rivers and Harbors Acts, to effectively control these navigable streams, it finally passed, in 1920, the Federal Power Act. In 1930, the year the contract here sought to be enforced was signed, it amended the Federal Power Act and established the Federal Power Commission.

The Federal Power Act was designed, amongst other things, to integrate the Federal and State jurisdictions in licensing water power projects. In this Act there is a separation of those subjects which remain under a state's jurisdiction from those subjects which the Commerce Clause of the United States Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Federal Power Act establishes a dual system of control. The United States and the State each have final authority within their own jurisdiction.

[5] Where the Federal Government supersedes the State Government, there is no thought that the two agencies shall each have final authority. Thus the Federal Government, by the Federal Power Act, is given exclusive jurisdiction to issue licenses for construction of dams, conduits, etc. in any stream over which Congress has jurisdiction. Title 16, Section 797(e), U.S.C.A. To control conditions under which these licenses are granted, Section 803 was enacted. Particularly pertinent to this case (to forbid any person, state or municipality from constructing, operat-

ing, or maintaining any dam, water conduit, etc. across, along, or in any of the navigable waters of the United States), Section 817 was enacted. In these fields the jurisdiction of the United States is supreme. Congress, in 1935, by the amendment then adopted to the present Section 817, expressly required a Federal license for every water power project in the navigable waters of the United States.

It left to the States permission to construct such projects upon compliance with State laws, rather than with the Federal Power Act, provided the projects were not in navigable waters of the United States, did not affect the interests of interstate or foreign commerce, and did not affect the public lands or reservations of the United States.

Section 817 superseded state laws as to any state jurisdiction over dam construction or maintenance on navigable waters.

Clearly then, the Federal Power Act was an act seeking to integrate Federal and State jurisdiction in this field, and clearly the Federal Government has superseded the State Government in its jurisdiction of the Clyde River so far as power and navigation rights are concerned.

As I have commented, a main item of interest to the defendant in its petition to the Public Service Commission is to acquire the penstocks running over this property through which is carried the diverted water which helps manufacture the defendant's water power.

[6] A dual final authority, with a duplicate system of State permits and Federal licenses required for each project, would make for chaos. It would be an impossible and completely unworkable situation. Congress did not intend to create such a situation. The Federal Power Act was meant to give the Federal Power Commission exclusive jurisdiction over all matters affecting a navigable stream.

It is clear to this Court that in this instance, the defendant, to comply with the terms of its contract, should have applied to the Federal Power Commission for a license or permission to acquire this property and interests therein.

It may well be, though we will never know, that when the parties executed the contract in 1930, the parties themselves were undecided as to what the tribunal would be which would have jurisdiction over the acquisition of these properties in 1955-1956. The Federal Power Act, passed in 1920, was amended in 1930, and the Federal Power Commission thereby created. It would have been a simple matter, had the defendant any doubt in its mind as to the tribunal having jurisdiction, to have filed a petition with the Federal Power Commission—as well as the Vermont Public Service Commission. Thus it could easily have abided by the terms of its contract.

This Court has spent considerable time in legal research of the problem in this case, but has found no cases which seem to be directly in point. However, my conclusion regarding the defendant's third affirmative defense seems to be in accordance with the holding and intent of the U. S. Supreme Court, as found in the case of First Iowa Hydro-Electric Co-op. v. Federal Power Commission, 1946, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143.

[7, 8] Thus it follows that since defendant, on March 27, 1956, was maintaining these penstocks carrying water of a navigable stream across property it was seeking to condemn—including these penstocks—and it was not a licensee of the Federal Power Commission when it filed its petition with the Vermont Public Service Commission, the Public Service Commission was without jurisdiction to hear and determine the petition. Since the defendant, on or before April 4, 1956, had not instituted condemnation proceedings before any tribunal having jurisdiction of such

proceedings for the purpose of acquiring the "Pulp Mill property, water power, dam, water privileges, and all buildings, machinery and fixtures" on this property as of October 1, 1930, the defendant is, under the contract, obligated to purchase the above-described property from the plaintiffs for $300,000.

Since the foregoing adjudication is dispositive of the case, the plaintiffs' request for an injunction restraining the Public Service Commission of Vermont from asserting jurisdiction of the petition for condemnation of this same real estate, is hereby denied.

Judgment Order

It is hereby ordered that the plaintiffs, Charles T. Prouty, et al., convey by warranty deed to the defendant, Citizens Utilities Company, all the realty, property, and proprietary interests described in the contract between the Newport Electric Light Co. and Abbie D. Prouty, dated July 29, 1929, pursuant to said contract. It is further ordered that upon tender of the above-described deed, the Citizens Utilities Company shall pay to the plaintiffs, Charles T. Prouty, et al., the sum of $300,000. Because the respective rights of the parties could not be determined before this date, no interest will be allowed.

COMPANION DECISION OF CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(Argued April 8, 1960 Decided May 24, 1960)

No. 259, Docket 25705

CITIZENS UTILITIES COMPANY,

Petitioner,

—v.—

FEDERAL POWER COMMISSION,

Respondent.

MILTON S. GOULD, Gallop, Climenko & Gould, New York City, REUBEN GOLDBERG, Washington, D. C., CLIFTON G. PARKER, Morrisville, Vt., *for petitioner.*

JOHN C. MASON, Deputy Gen. Counsel, Federal Power Commission, Washington, D. C., *for respondent* (Willard W. Gatchell, Gen. Counsel, Howard E. Wahrenbrock, Solicitor, Leonard D. Eesley, Assistant General Counsel, Daniel Goldstein and Joseph B. Hobbs, Attys., Federal Power Commission, Washington, D. C., on the brief).

Before:

LUMBARD, *Chief Judge*, and
HAND and HINCKS, *Circuit Judges.*

HAND, *Circuit Judge*:

In this case the petitioner, a Delaware corporation, has built hydroelectric dams at several places on the Clyde River, Vermont, which rises in the northeast corner of the state and empties into Lake Memphremagog at Newport, Vermont. Lake Memphremagog itself extends from Newport across the border of Canada and into Canada.

After leaving a small pond, called Spectacle Pond, the Clyde passes through Island Pond, another small sheet of water, whence it meanders for six or seven miles until it is joined by a brook that carries the overflow of two other ponds, Seymour Lake and Echo Pond, at East Charleston. The Clyde continues for about five miles further, passing through Pensioner Pond and thence through Salem Pond until after three miles or so it passes through Clyde Pond and after about two miles more reaches Lake Memphremagog. The petitioner had already built dams at the outlets of Seymour Lake and Echo Pond and also across the river at West Charleston and at Clyde Pond. Another dam above the West Charleston dam had been built at Barton Village which the petitioner does not control. The occasion of this suit is the petitioner's construction of a new project including a "diversion dam," a canal, and a power plant, called Unit No. 11, across the river below the dam at the outlet of Clyde Pond.

In June 1957, the Commission began to investigate this partially completed power project in order to determine whether it was in the public interest to control it in order to preserve the navigation and water supply of the Clyde. In preliminary negotiations the parties stipulated that the petitioner should be free to oppose the jurisdiction of the Commission in spite of a "declaration of intention" made by the petitioner. The Commission held extensive hearings before a presiding examiner who wrote a deci-

sion declaring that the Clyde was not "navigable water of the United States" except for the first 4800 feet from its mouth, but that the petitioner's proposed Unit No. 11 and its Newport project affected the interests of interstate or foreign commerce in that part of the stream, and that the Commission therefore had jurisdiction under § 817 of Title 16, U.S.C.A., to grant or refuse a license to maintain both projects. The Commission reversed the examiner and found the whole river navigable, apparently from Spectacle Pond to its mouth, and also that not only Unit No. 11 and the Newport project affected the navigability of the river, but that the petitioner's other projects did so. The petition is to review all parts of the Commission's order.

There can be no doubt that the Clyde Pond dam and Unit No. 11 both have an effect upon the navigability of the river in its last 4800 feet. Indeed, the petitioner does not dispute that the volume of water that reaches the river below the Unit No. 11 changes when the "diversion dam" and the Clyde Pond dam are opened, as they are when hydroelectric generators at Unit 11 and at the Newport project are operated. It was proved that when the dams were opened, the height of the water below the Unit 11 rose eighteen inches and did not assume the level of the Lake until it reached Gardner Park Bridge at a distance of more than half a mile away. There was also evidence that the shut-down of Unit No. 11 made a sixteen foot boat with four passengers and 1800 pounds of freight repeatedly scrape bottom, although when the dam was opened the boat moved without touching. Again, when the power was shut off and the dams were filling, rocks showed above the water in the stream that were covered when the power was put on again. There was a regular correlation between the two, showing changes in total water volume at times of between 12 and 282 cubic feet per second.

[1] The petitioner's dams at West Charleston being about ten miles above the Clyde Pond dam, and those at Seymour Lake and Echo Pond being about twenty miles away, it is, of course, true that the effect of the "diversion dam" at Unit No. 11 and of the Clyde Pond dam upon the navigable part of the river is much more immediate than that of the dams upstream, but the water impounded by the upper dams can in the end escape only through that last mile, and the dams give the petitioner control over the time when it shall arrive. We omit the Barton Village project that does not belong to the petitioner; but Seymour Lake and Echo Pond together impound 4500 "acre feet" of water as against only 1000 "acre feet" impounded by the Clyde Pond dam. It cannot be said that the "effect" of the petitioner's control of so much water tributary to the navigable part of the river is so inconsiderable as to be beyond the scope of § 817; that is to say, that "the interests of interstate or foreign commerce would" (not) "be affected by the construction of a dam" of the kind here at issue. The only question before us is as to the jurisdiction of the Commission, not how far the public interest requires the Commission to regulate their maintenance and use. It must always be remembered that in construing subchapter I of chapter XII of Title 16 U.S.C.A., we are to take into consideration, not alone the condition of a stream as it is, but that "it is proper to consider the feasibility of interstate use after reasonable improvements which might be made." United States v. Appalachian Electric Power Company, 311 U. S. 377, 409, 61 S. Ct. 291, 300, 85 L. Ed. 243. Since there can be no doubt that the last mile of the river is "navigable" without change, the only question is whether the amount of water by which the petitioner can vary its flow affects that part of the river enough to give the Commission jurisdiction over the granting of a license.

[2] It is not necessary for us to measure how much such variation will justify actual intervention by the Commission. The "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive" (, 825/(b)), and it is apparent that the evidence was enough to prove that the petitioner's dams, without change and at the will of the petitioner, are capable of "affecting" temporarily the ow of water in the river below Unit 11, and, indeed, that they do so in the ordinary operation of the petitioner's business. The situation appears to us to be essentially the same as in Georgia Power Company v. Federal Power Commission, 5 Cir., 152 F. 2d 908, 913.

Concluding as we do that all the petitioner's dams on the Clyde River do "affect" the navigability of the last mile of that river, it becomes unnecessary for us to decide how much if any of the river above Unit No. 11 is "navigable." That question therefore we leave open.

The order of the Commission requiring an application for license is affirmed on the limited ground stated above.

TITLE 16, UNITED STATES CODE, CHAPTER 12

[Federal Power Act; Section 27]

821. *State laws and water rights unaffected*

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation, or for municipal or other uses, or any vested right acquired therein. June 10, 1920, c. 285, 27, 41 Stat. 1077.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of June, one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY,

Plaintiffs-Appellees.

—v.—

CITIZENS UTILITIES COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is modified in accordance with the opinion of this court and as so modified said judgment be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO
Clerk